

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHRISTOPHER BILLINGS

Claimant

V.

STATE OF KANSAS

Self-Insured Respondent

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Docket No. 1,032,850

ORDER

Respondent requested review of the March 4, 2015, Post-Award Medical Award by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ granted claimant's post-award request for a walk-in tub, an adjustable bed and a more powerful TENS unit, finding these items are necessary to cure and relieve the effects of claimant's injury.

Respondent appeals, arguing the walk-in tub and adjustable bed are not necessary to cure and relieve claimant of the effects of his injury. Therefore, respondent contends, the Award should be modified to grant only the request for the stronger TENS unit which respondent does not object to. Respondent submits the opinions of physician assistant Brian D. Calkins and Wade B. Welch, M.D., lack credibility because a physician assistant does not fall into the statutory definition of health care provider, and Dr. Welch never stated the tub or the bed were medically necessary, only agreeing with the opinions of Calkins. Therefore, the opinions fail to overcome claimant's burden of proving the tub and bed are necessary due to the back injury.

Claimant argues the ALJ should be affirmed.

The issue on appeal is whether the ALJ erred in awarding claimant the adjustable bed and walk-in tub.

FINDINGS OF FACT

Claimant injured his back in 2006. He had fusion surgery and the surgeon nicked a nerve that left claimant with problems with his left leg. Claimant lost 60 percent feeling from his spine to his hip and down to his knee and 80 percent feeling from the knee down to the foot. Claimant testified when he stands up sometimes his leg will give out and he falls.

On April 15, 2010, claimant settled his claim as a compromise of a split between a permanent total disability and a permanent partial disability in sum of \$112,000. All issues were closed as of the settlement except claimant's right to future medical treatment.

Claimant filed an application for post-award medical treatment on May 14, 2013, requesting "authorization of medical equipment necessary for continued care." Claimant was sent for a court-ordered IME, on November 12, 2013, at which time he met with R. Sean Jackson, M.D., at the University of Kansas Orthopedics and Sports Medicine. Dr. Jackson indicated assistive devices are a reasonable consideration.

Claimant filed another application for post-award medical treatment on January 17, 2014, again requesting authorization for medical equipment necessary for continued care. In a letter dated February 12, 2014, claimant's attorney asked Dr. Jackson if claimant would benefit from a tub with jets, an adjustable king size bed and a lift-chair. Respondent later authorized the lift chair. The doctor recommended a quality supportive bed, but rejected the adjustable king size bed as not medically necessary. Additionally, the doctor rejected the tub as a medical necessity.

On June 5, 2014, claimant filed another application for post-award medical requesting authorization of a lift chair and an adjustable bed.

A post-award hearing was held on August 13, 2014, where respondent authorized claimant to receive a recliner or lift chair per the recommendation of Dr. Jackson. At the time of this hearing, claimant was sleeping in a recliner because his bed, a California king, is a flat bed and there is no way it will conform to claimant's back to allow him to raise his legs to alleviate the pressure on his back. Instead, he has to put pillows underneath his legs to lift them up from his torso, to alleviate the pressure on his back.

Claimant has slept in his recliner for over a year because it has a small lumbar system, a heat pad and a vibrator he can use along with his TENS unit when his back is bothering him. In the recliner, claimant is at a 15 to 25 degree angle with his legs up and

a pillow underneath his legs. Claimant is able to sleep three to four hours a day this way.

Claimant testified he has a California king bed because it is the largest bed available and it fits his six foot five inch body. Claimant would like to have a bed that fits his body and adjusts, to help alleviate his back pain. Claimant indicated there is nothing wrong with his current mattress other than it is not adjustable.

Claimant met with Wade Welch, M.D., a neurologist, on October 15, 2014, upon referral from physician assistant Calkins, for evaluation of his chronic low back pain. Dr. Welch indicated claimant's biggest complaint at the time of this visit was numbness in his legs. Claimant complained of restless leg syndrome, cramping in his feet, toe curling and occasional numbness and tingling in his upper extremities, mostly on the left. Claimant's restless leg syndrome was improved with medication.

Dr. Welch diagnosed claimant with failed back syndrome with chronic low back pain, left lower extremity weakness and numbness. He felt claimant was a significant fall risk and agreed claimant needs a walk-in tub. There was no mention of an adjustable bed.

Claimant's bathroom is 8 feet by 12 feet and his tub is 2 1/2 feet by 7 1/2 feet. A walk-in tub is 2 1/2 feet by 7 1/2 feet with a walk-in door and, depending on the type, it can stand anywhere from 2 1/2 feet to 3 feet tall with shower door and jets. Claimant has no assistive devices in his bathroom and has to use the sink in front of him to step out of the shower. The way his bathroom is set up there is no way to mount metal handles. Claimant testified walk-in tubs range between \$12,000 and \$26,000 and he had a deal working with a company to get the price for a \$26,000 tub down to \$16,000 with a five-year warranty due to his status as a disabled veteran.

The VA declined to pay for the walk-in tub because claimant sustained a workers compensation injury. Claimant testified either he will get a walk-in tub or he will end up in the hospital with additional severe injuries, and possibly in a wheelchair.

On December 18, 2014, claimant filed another application for post-award medical treatment requesting authorization for the adjustable bed, walk-in tub and replacement of his TENS unit which was not working properly.

Physician assistant Calkins wrote a letter dated January 14, 2015, stating he was claimant's primary care physician and that claimant has severe pain and is unable to sleep in a chair. Mr. Calkins indicated claimant's sleep deprivation has gotten so bad that he is barely able to care for himself, and therefore definitely needs a special bed and the tub.

On January 23, 2015, Dr. Jackson recommended a quality supportive bed. He felt neither an adjustable bed nor a king size bed were medically necessary. He denied the tub unit with jets, but said yes to the lift chair.

A post-award hearing was held on February 18, 2015, at which time, claimant requested the adjustable bed, walk-in tub and a new TENS unit. Claimant again requested the walk-in tub recommended by Dr. Welch because he is a fall risk. Claimant testified he has fallen four times getting out of the tub and at least five to six times just walking. There is no room in claimant's current tub to put a chair or anything for him to sit on. Claimant testified he continues to sleep in his recliner.

On March 4, 2015, the ALJ granted claimant's requests for a walk-in tub, an adjustable bed and a more powerful TENS unit, finding those items necessary to cure and relieve the effects of claimant's injury. As noted above, the more powerful TENS unit is not in dispute.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

K.S.A. 2006 Supp. 44-510h(a) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

Respondent contends that a king size adjustable bed and walk-in tub are not reasonably necessary to cure and relieve claimant from the effects of his injuries. The statute requires that an employer provide such medical treatment as may be "reasonably necessary to cure and relieve the employee from the effects of the injury." Whether or not an item or device cures or relieves an injured worker from the effects of an injury should

¹ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

be determined on a case-by-case basis.³ In the past, the Board has required employers to pay for items that may not be considered medical treatment in the traditional sense. The Board has found that a mattress prescribed by a physician for an injured employee,⁴ and making a vehicle handicap accessible,⁵ were forms of medical treatment reasonably necessary to cure and relieve injured employees from the effects of their injuries. In *Finney*,⁶ the Kansas Court of Appeals agreed with the Board that replacing worn carpeting in an injured employee's home with hard floor covering so he could operate his wheelchair more easily was a form of medical treatment reasonably necessary to cure and relieve the injured employee from the effects of his injury.

Here, as in *Finney*, claimant is requesting a home improvement as a form of medical treatment. The walk-in tub helps relieve claimant from the effects of the work-related injury and also assists in preventing claimant from suffering further injury from a possible fall. The Board finds the requested walk-in tub is reasonably necessary to cure and relieve the claimant from the effects of his work-related injury. The opinion of Dr. Welch is the most persuasive on this issue.

Claimant's request for a king-size adjustable bed is a more difficult question. Physician assistant Calkins agreed the special bed was medically necessary. However, Dr. Welch failed to address the bed issue and Dr. Jackson recommended a quality supportive bed, but not an adjustable bed. Claimant contends that his 6 foot 5 inch frame requires an oversized king. With the exception of the physician assistant, no health care provider supports claimant's request. The opinion of Dr. Jackson, the board certified orthopedic surgeon, carries more weight than that of the physician assistant. The Board finds claimant has not satisfied his burden of proving that the oversized king-size, adjustable bed is reasonably necessary to cure and relieve the claimant from the effects of his work-related injury. The Post-Award Medical Award of the ALJ on this issue is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed on the issue of the walk-in tub, but reversed on the issue of the king-size adjustable bed. Claimant has satisfied his burden of proving the

³ *Conner v. Devlin Partners, LLC*, No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005).

⁴ *Id.*

⁵ *Froese v. Trailers & Hitches, Inc.*, No. 1,036,333, 2008 WL 651685 (Kan. WCAB Feb. 29, 2008).

⁶ *Finney v. Finns Electric Company, Inc.*, No. 98,330, 2008 WL 4140639 (Kansas Court of Appeals unpublished opinion filed Sept. 5, 2008, *rev. denied* April 28, 2009),

necessity of the tub as a reasonably necessary medical treatment for his work-related injuries, but has failed to satisfy his burden on the bed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated March 4, 2015, is modified as above noted.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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